IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 1267 OF 2002

Babasaheb @ Babusha Dagdu Jadhav .. Appellant

versus

The State of Maharashtra .. Respondents

...

Mr.Jayesh Kocheta for the appellant.

Mr.D.P. Adsule, APP for the State.

CORAM : V.M. KANADE, J

DATED : 13th September 2004.

ORAL JUDGEMENT:-

1. The appellant is challenging judgement and order passed by the third Adhoc Addl. Sessions Judge at Pune in Sessions Case no. 27 of 2002 whereby the appellant is convicted under section 376 of the IPC and is sentenced to undergo RI for six months. He is also convicted under section 450, 352 and 506 (II) of

the IPC and sentenced to undergo 3 years, 6 years and 2 years respectively. A fine is also imposed of Rs.500/-, Rs.300/- and Rs.500/- respectively and in default to suffer RI for 6 months, 3 months, 3 months respectively.

2. The prosecution case in brief is that the appellant forcibly entered the house of the complainant on 16th August 2001 between 1.30 am to 2.00 am by removing the bricks of the front side wall in order to enter the house and thereafter committed rape upon her by putting her in fear of death. The appellant accused was charged under sections 376, 450, 342 506 (II) of the IPC.

3. The prosecution case is that the prosecutrix Smt. Vatsala G. Kalambkar who is a 60 year old lady was residing alone in the hutment. She had two married daughters who were residing separately in front of her house. On 15th August 2001, her daughter Sharda was celebrating birthday of her son and prosecutrix was invited for dinner at about 10.30 p.m. After having dinner, she returned home and at about 1.30 am to 2.00 am, she felt suffocated and when she woke up, she saw the accused. She tried to raise

shouts. However, her mouth was shut with the help of a quilt by the accused. According to her, the accused threatened her not to raise shouts. It is the complainant's case that thereafter the accused forcibly raped her. Thereafter, the accused went away. Thereafter, the complainant called her daughters. Their house was bolted from outside. She removed the bolts and thereafter she narrated the incident. The prosecution noticed that a hole was prepared on the front wall of the house by removing a brick-bat. Complaint was lodged against the accused. The accused was charged under section 376, 452, 506 (II) and the trial Court convicted the accused for 7 years under section 376 and under other sections as stated thereinabove. The learned counsel appearing on behalf of the appellant submitted that the prosecution has reasonably failed to adduce evidence for the offences punishable under section 450, 342, 506 (II) of the IPC. He further submitted that there was no corroboration to the testimony of the prosecutrix. The medical evidence also did not support the prosecution case particularly when the case of the prosecutrix was that there was a scuffle between the prosecutrix and the accused which lasted for about 15 to 20 minutes. It was further submitted that so far

as Chemical Analuyser’s report is concerned, the clothes of the prosecutrix and the appellant were kept together in the police station and were not sent promptly to the Chemical Analyser. It was submitted that therefore, the evidence of semen of ’B’ group found on the saree of the prosecutrix and underwear of the appellant ought not to have relied upon. It is further submitted that the prosecutrix was in the business of selling illicit liquor and both the prosecutrix and her daughters have criminal antecedents.

4. The learned APP appearing on behalf of the State submitted that the Apex Court has observed in a catena of cases that the sole uncorroborated testimony of the prosecutrix was sufficient to convict the accused. The learned APP submitted that the evidence of the prosecutrix was further corroborated by Chemical Analyser’s report which merely showed that semen of ’B’ group was found on the saree of the prosecutrix and underwear of the appellant. He submitted that the question of any injuries on the person of the complainant were not found because the case of the prosecutrix is that the accused had put her under the fear of death and had threatened her

that if she tried to raise any shout, she would be immediately killed.

5. The learned counsel appearing on behalf of the appellant has taken me through the evidence which is adduced by the prosecution as also the judgement and order of the trial court. The prosecution has examined six witnesses. PW no.1 is the prosecutrix. PW no.2 Mangale Jole is the neighbour of the prosecutrix. PW no.3 Sharda is the daughter of the prosecutrix. PW no.4 is the panch witness. PW no.5 is the Doctor who examined the prosecutrix. PW no.6 is the PSI who investigated the case. So far as PW nos.2, 3, 4 & 5 are concerned, they have not witnessed the incident. The entire prosecution case vests therefore on the sole testimony of PW no.1 Smt. Vatsala Kalambkar. PW no.1 Vatsala in her evidence has stated that the accused entered the house when she was fast asleep and she felt suffocated at about 1.00 am to 2.00 a.m. and she felt that somebody was pressing her and therefore, she removed the quilt from her face. She has stated that there was electric light in the house and that she had slept on a cot. At that time, she saw the accused by the side of her cot. She has stated that the accused gave threats

that she should not shout otherwise she should be killed and therefore, she kept her mouth shut. Thereafter, the case of the prosecutrix is that the accused forcibly committed rape on her without her consent. The complainant's case is that after the accused ran away, she raised the shouts. However, the daughters could not respond to her call as their house was bolted from outside. She therefore, had to come out of her house and remove the bolt from the door. She thereafter narrated the incident. In the cross examination the complainant stated that there was a struggle between her and the accused for about 15 to 20 minutes. However, she did not sustain any injury on her person. She has further stated that her house was built with bricks and mud. However, she did not hear any noise while the bricks on her wall was removed. In the cross-examination, she has further admitted that there was an altercation between the accused and Sahebrao Sonwar and the Mahila President Kumbharbai who were the flat hoistation and displaying of Board of Rashtrawadi Congress. She has further admitted that there were cases pending between her and the wife of Madhav i.e. Shalini which were pending and that the accused was treating the wife of Madhav as his sister. She has further admitted that both the

daughters are office bearers of Mahila Congress Party. In the cross examination, she has further admitted that when her clothes were seized, nobody was present at the police station. She has further admitted that she used to sell illicit country liquor in the past. From the evidence of PW no.1, the story of the alleged rape in my view appears to be improbable. Firstly, though she has admitted that there was a struggle for about 15 to 20 minutes, the Doctor has stated in his evidence that there were no injuries on her person. Apart from that, it is difficult to imagine that a woman who is 60 years old would not hear the outer door of her house been broken. From the evidence which has come on record, it is clear that the complainant was residing in a thickly populated hutment and her house was surrounded on either side by her two daughters and number of other people. There was a birthday party which was going in her daughter's house. It is difficult to imagine that the accused would enter the house by breaking the bricks on the wall of the house of the prosecutrix and no person had witnessed or heard the accused entering into the house. Apart from that, the character of the witness also discloses that she was carries on business of illicit liquor in the past and there were criminal

cases pending against her and both her daughters. Admittedly, there was some enmity between the accused and members of her party. Thus, in this background, it is difficult to accept the solitary statement of the prosecutrix about the said incident. Therefore, in my view, the evidence of PW no.1 cannot be relied upon.

6. Apart from the evidence of PW no.1, the only evidence which is available with the prosecution case in the form of C.A's report which indicates that semen stains were found on the saree of the complainant and underwear of the accused and the semen stains belong to 'B' blood group, SO far as this evidence is concerned in cross examination of the complainant PW no.1, she has stated at the time of the seizure of the clothes from her person. There were no independent panchas present and the clothes were seized in the police station and were kept there. In the face of this admission on the part of the prosecutrix, it becomes difficult to rely on the prosecution case so far as C.A's report are concerned. there is therefore, in my view, a serious lacunae in the prosecution case. So far as seizure of the clothes are concerned of the complainant and the accused in

such cases, the possibility of tampering the evidence cannot be ruled out. Apart from this evidence, the prosecution has not been able to bring the evidence of any other witness to show that the accused was found near the scene of the offence or to establish his presence near the house of the prosecutrix. Coupled with this, the admitted position is that the relations between the accused and the complainant was strained. On the other hand, there were cases pending against the prosecutrix and the sister of the accused and on the other hand, there was also a political rivalry. Thus, in my view, the finding of the trial court will have to be set aside.

7. The judgement and order is therefore, set aside and quashed. The accused is acquitted of the charges which are levelled against him. The accused is acquitted and is directed to be released forthwith unless he is otherwise required in any other case.

V.M. KANADE, J